Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1330

FRANCIS CLIFFORD, Commissioner of the Department of Health of Niagara County, N.Y.,

Petitioner,

—VS.—

SUSAN B., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly exercised its pendent jurisdiction, and its jurisprudential obligation to avoid the needless adjudication of constitutional issues, by striking down a county ordinance which plainly violated a well-settled legal doctrine only recently announced by New York State's highest court?

STATEMENT OF THE CASE

Petitioner's statement of the case and its procedural history are substantially correct and accepted by respondents. However, petitioner's description of the legal issues involved is seriously misleading and accurately reflects neither the decisions below nor the question before this Court.

The Niagara County ordinance challenged by respondents in this case was patterned after a similar ordinance enacted several months earlier in Akron, Ohio, and clearly reflected a conscious attempt to limit abortions in Niagara County.*/

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*/ In its prefatory section, the Niagara County ordinance cites "the scientific fact, which everyone really knows, that human life begins at conception and is continuous-whether intra-or extra-uterine-until death." (A 2)

Substantial portions of the Akron ordinance were recently declared unconstitutional by a federal district court, Akron Center for Reproductive Health Inc. v. City of Akron, C78-155A (N.D.Ohio, August 22, 1979), and another, almost identical law was similarly struck down on constitutional grounds in Louisiana. Margaret S. v. Edwards, No. 78-2765(E.D.La. Feb. 29, 1980).

In this case, it was unnecessary to reach those constitutional issues and to compile the lengthy factual record which would have been necessary for their adjudication. Instead, the district court exercised its pendent jurisdiction to invalidate the ordinance upon the authority of an unequivocal decision rendered by New York's highest court only a few years ago. See Robin v. Incorporated Village of Hempstead, 30 N.Y.2d 347, 334 N.Y.S. 2d 129 (1972). In so doing, the district court recognized its responsibility to avoid the needless adjudication of constitutional issues and to conserve judicial resources wherever possible.

Petitioner does not dispute that the state law ground relied on by the district court arose from the same set of operative facts as respondents' federal constitutional claim. Nor does petitioner contest the relevance of Robin which held that the subject matter of abortion had been pre-empted by New York State and could not be regulated on a local basis except under the most unusual circumstances. Rather, petitioner has endeavored both in this Court and below to convert this case into a mammoth confrontation over state constitutional law which should not have been decided in a federal forum.

The legal merits of that claim will be addressed in the argument which follows. However, certain factual matters require clarification in light of the petition for certiorari. Most importantly, the district court did not rule that Niagara County Local Law 7-78 violated the home rule provisions of the New York State Constitution. Indeed, the New York State Constitution is not even mentioned in either of the district court's two opinions (A 19, 30). Likewise, the New York State Constitution is not mentioned in the brief affirmance order by the United States Court of Appeals for the Second Circuit (A 17). Moreover, the pending state court action referred to in petitioner's papers was not commenced until respondents had already obtained a preliminary injunction in federal court. Its motivation was clearly perceived and aptly described by the state court: "[P]laintiffs, as many others may be, are disappointed by the District Court's injunction against the enforcement of Local Law No. 7" (A 27).*/

*/ Plaintiffs in the state court action were represented by the same counsel who appear in this Court on behalf of Niagara County, notwithstanding the fact that Niagara County was named as a defendant in the state court action. If this Court grants certiorari, respondent reserves the right to move to disqualify petitioner's counsel based on this obvious conflict of interest.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE DECISION BELOW IS FULLY CONSISTENT WITH THIS COURT'S PRIOR OPINIONS ON ABSTENTION.

This Court has repeatedly stressed that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." Colorado River Water District v. United States, 420 U.S. 800, 813(1976). Relying on this Court's prior opinions, the district court properly held that the narrowly limited circumstances which might justify abstention are not present here. Reetz v. Bozanich, 397 U.S. 82, 86(1970); Zwickler v. Koota, 389 U.S. 241, 248(1967).

In general, the decisions of this Court indicate that abstention is appropriate under one of two circumstances. First, when resolution of an unsettled issue of state law will moot or modify a federal constitutional question. See Railroad Commission v. Pullman Co., 312 U.S. 496 (1941). Or second, when a federal court is confronted with an undecided question of state law which implicates an important state policy or administrative scheme. See Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959). In policy terms, the first rationale reflects a well-settled interest in avoiding the needless adjudication of constitutional issues; the second corresponds to a division of power between state and national sovereignties in our federal system.

Under either model, however, this Court has "frequently emphasized that abstention is not to be ordered unless the state [law issue] is of an uncertain nature. . ." Zwickler v. Koota, supra, 389 U.S. at 251 n. 14. See also, Colorado River Water Cons. District v. United States, 424 U.S. 800, 815 (1976); Harris County Commissioner's Court v. Moore, 420 U.S. 77, 83 (1975); Reetz v. Bozanich, 397 U.S. 82, [illegible] (1970). Indeed, "an uncertain issue of state law" is "the essential prerequisite for abstention," Procunier v. Martinez, 416 U.S. 396, 402-403 (1974).

This emphasis on uncertainty is easily understood. If the state law is settled and can be fairly applied by a federal judge, there is no countervailing interest which justifies "the delays inherent in the abstention process and the danger that federal rights might be lost in the absence of expeditious adjudication in federal court," Harris County Commissioner's Court v. Moore, supra, 402 U.S. at 83.*/

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*/ Petitioner's attempt to rely on a collusive state court proceeding filed after the issuance of a preliminary injunction by the federal court to justify abstention is clearly without merit.

In this case, the element of uncertainty in the governing state law which is a prerequisite for abstention is entirely lacking. To the contrary, Robin represents an unambiguous pronouncement of the law in this area by New York's highest court which has never been challenged in any subsequent decision.*/

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*/ Petitioner seizes upon the fact that Robin has rarely been cited to question its continuing validity. In particular, petitioner alleges that the "local problem" exception first announced in Robin has never been analyzed in relation to a local abortion law. The relevance of this reductio ad absurdum argument is difficult to discern, however. It is undoubtedly true that Robin has never been applied to a variety of local laws, but this only suggests the narrowness of its "local problem" exception. Indeed, the fact that Robin has rarely been cited is far less significant than that it has never been questioned.

Properly viewed, the task presented to the district on respondents' motion for partial summary judgment was simply to apply a well-settled legal principle to a set of undisputed facts. As the district court recognized, "[t]his is not the type of state law question that requires abstention" (A 32).

This Court's decision in County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959), is almost directly on point. Although federal jurisdiction in Mashuda was based on diversity of citizenship rather than 28 U.S.C. §1343, and the state law question involved eminent domain rather than the regulation of abortion, the considerations arguing for and against abstention were remarkably similar to those in this case. In holding that the district judge had improperly abstained upon the facts presented, Justice Brennan explained:

> "[A]djudication of the issues in this case by the District Court would present no hazard of disrupting federal-state relations. The respondents did not ask the District Court to apply paramount federal law to prohibit state officials from carrying out state domestic policies, nor do they seek the obvious irritant to state-federal relations of an injunction against state officials. The only question for decision is the purely factual question whether the County expropriated the respondents' land for private rather than for public use. The District Court would

> simply be acting as would a court of the State in applying to the facts of this case the settled state policy that a County may not take a private citizen's land under the State's power of eminent domain except for public use." 360 U.S. at 189-190.

The situation here is precisely the same.*/

In essence, petitioner's argument reduces to the claim that abstention should have been ordered because this case implicitly involves a state constitutional question

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*/ Of course, any time a federal court decides an issue of state law there is an abstract possibility that it may reach a different result than a state judge presented with the same facts. However, the more settled the state law, the less likely that outcome. Moreover, the possibility of inconsistent judgments exists in every case and is not, standing alone, enough to justify abstention. Meredith v. Winter Haven, 320 U.S. 228, 234 (1943). Were the rule otherwise, there could be no diversity jurisdiction and no pendent jurisdiction. Indeed, at points, that seems to be the position petitioner is advocating. Yet, interestingly, petitioner does not challenge the correctness of the district court's ruling on the state law issue.

touching on the supposedly sensitive issue of local home rule. The first factor is irrelevant since the rules of abstention do not vary depending on whether the state law involved is statutory, constitutional or decisional. See Askew v. Hargraves, 401 U.S. 476 (1971); Reetz v. Bozanich, supra, Hart & Wechsler, The Federal Courts and the Federal System, pp. 992-993 (2nd ed. 1973). The important consideration is the clarity of the state law, not the form which it takes.

And while home rule may be a particularly local concern, it is not beyond the competence of federal courts to apply the clear guidelines established in Robin. This Court considered and rejected just such a claim in Mashuda, supra, 360 U.S. at 191-192:

> "[T]he fact that a case concerns a State's power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty. Surely eminent domain is not more mystically involved with a 'sovereign prerogative' than a State's power to regulate fishing in its waters, Toomer v. Witsell, 334 U.S. 385, its power to regulate intrastate trucking rates, Public Utilities Com. v. United States, 335 U.S. 534, a city's power to issue certain bonds without a referendum, Meredith v. Winter Haven, 300 U.S. 228, its power to license motor vehicles, Chicago v. Atchison, T. & S.F.R. Co., 357 U.S. 77, and a host of other

> governmental activities carried on by the States and their subdivisions which have been brought into question in the Federal District Courts despite suggestions that those courts should have stayed their hand pending prior state court determination of state law."

In light of these principles, the decision below was manifestly correct. Petitioner has not presented any new legal issue which would justify granting a writ of certiorari.

II.

THE ONLY QUESTIONS PRESENTED BY THIS RECORD ARE EVIDENTIARY AND FACTUAL

Petitioner's concession that Robin would be controlling in the absence of any unique local problem in Niagara County necessarily implies that abstention would be unnecessary under those circumstances. In addition, the only unique local problem which has ever been suggested during the course of this litigation is the so-called Love Canal disaster which was fully described in the district court's first opinion. (A 21).

Accordingly, even under petitioner's interpretation, the propriety of the district court's refusal to abstain turns upon the validity of the district court's factual finding that Local Law No. 7-78

was prompted by a general desire to limit abortions rather than by a specific concern with the particular problems created by Love Canal. That finding was based upon a careful review of the entire legislative record and a close reading of the ordinance itself. The persuasiveness of the district court opinion speaks for itself (A 32-37). But in any event this sort of factual dispute, especially when placed against the background of clear legal principles, is not a proper basis for granting a writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in the above-styled matter should be denied.

Respectfully submitted,

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